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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF QWEST
CORPORATION'S PETITION FOR
ARBITRATION AND APPROVAL OF
INTERCONNECTION AGREEMENT
WITH NORTH COUNTY
COMMUNICATIONS CORPORATION
OF ARIZONA PURSUANT TO SECTION
252(b) OF THE COMMUNICATIONS
ACT OF 1934, AS AMENDED BY THE
TELECOMMUNICATIONS ACT OF
1996 AND APPLICABLE STATE LAWS

DOCKET NO.: T-01051B-09-0383
T-03335A-09-0383

NORTH COUNTY
COMMUNICATIONS
CORPORATION'S MOTION TO
DISMISS QWEST CORPORATION'S
PETITION FOR ARBITRATION

I. History of the Proceeding

As Qwest Corporation ("Qwest") admits in its Petition for Arbitration ("Qwest Petition"), Qwest and North County Communications Corporation ("North County") are already parties to an interconnection agreement that became effective on August 27, 1997 ("Existing ICA") (attached to the accompanying Affidavit of Joseph G. Dicks as Exhibit "A"). Qwest Petition, 3:20-24. The parties also agree that the Existing ICA between them is currently effective and, by its own terms, remains in effect until a new

1 agreement becomes effective between the parties. Id.

2 On or about July 2, 2008, North County received a request for negotiations from
3 Qwest regarding a new interconnection agreement. The parties agreed to an extension
4 of the arbitration window without waiving any rights or making any admissions that
5 arbitration was appropriate such that the window to file a petition for arbitration would
6 commence on July 9, 2009 and end on August 3, 2009, inclusive.
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8 On July 31, 2009, Qwest initiated this proceeding to compel arbitration of a new
9 interconnection agreement with North County before the Arizona Corporation
10 Commission ("Commission") claiming such petition was filed pursuant to 47 U.S.C. §
11 252(b) of the Telecommunications Act of 1996 ("the 1996 Act") and A.A.C. R14-2-
12 1505. Qwest Petition, 1:17-22, 3:3-4. As will be argued below, North County
13 respectfully contends that the petition is improper on its face and respectfully submits
14 that this Commission lacks jurisdiction to hear the petition pursuant to 47 U.S.C. §§
15 251, 252.
16

17 While negotiations up to this point had not made any substantive progress, when
18 North County replaced its prior counsel with Dicks & Workman, APC, shortly after the
19 petition was filed, substantive negotiations began in earnest. Thereafter, both parties
20 agreed to multiple stays of the arbitration proceeding to allow the parties, who had
21 worked amicably under the old agreement for more than a decade, to try to negotiate a
22 new agreement amongst themselves.
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1 In a procedural conference before the representative of the Commission on
2 January 8, 2010, the parties indicated to the Commission that Qwest felt an impasse had
3 been reached and had begun to prefer formal arbitration as to continuing private
4 negotiation. In its initial Position Statement North County gave Qwest and the
5 Commission clear indication of North County's intent to raise the issue of Commission
6 jurisdiction now that this matter was proceeding formally. In the subsequent scheduling
7 conference, it was decided that North County's announced Motion to Dismiss should be
8 resolved before the regular arbitration schedule and that this motion should be filed no
9 later than April 9, 2010.
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13 **II. Statutory Framework**

14 The 1996 Act gives state utilities commissions a federal mandate to arbitrate
15 interconnection agreements between local exchange carriers within certain defined
16 limits. 47 U.S.C. § 252.¹ This authority and its limitations are implemented and
17 incorporated by reference in Arizona state law by A.C.C. R14-2-1501, *et. seq.* Section
18 252 of the 1996 Act establishes a specific pathway whereby carriers requesting
19 interconnection or services may request negotiations subject to federal obligations and
20 duties in subsection (a), and may petition for said arbitration if the negotiations fail
21 subject to the limitations of subsection (b).
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27 ¹ As used herein "Section" will refer to Title 47 of the United States Code unless
28 otherwise specifically designated.

1 Under the Section 252(a)(1), a LEC may only initiate Section 252 negotiations or
2 arbitration, “[u]pon receiving a request for interconnection, services, or network
3 elements pursuant to section 251 of this title”. Under Section 252(b)(1), an express
4 conditions precedent to petitioning for arbitration is that the “carrier receives a request
5 for negotiation under this section.”² Arizona incorporates these requirements by
6 expressly referencing Section 252(b)(1) in describing when arbitration is allowed.
7 A.C.C. R14-2-1505(A)(1) (Commission only has jurisdiction over an interconnection
8 arbitration where a LEC “receives a request for negotiation under 47 U.S.C.
9 252(b)(1)”).³

10 **III. Argument**

11 **A. Qwest’s Petition Is Facially Insufficient To Invoke The Jurisdiction Of** 12 **The Commission To Arbitrate A New Interconnection Negotiation** 13 **Under Section 252.**

14 Negotiations subject to Section 252 may only be initiated “[u]pon receiving a
15 request for interconnection, services, or network elements pursuant to section 251 of
16 this title.” Section 251 imposes, inter alia, duties on all carriers to interconnect upon
17 request and provide each other services and network elements. The problem here is that
18 Qwest did not initiate this round of negotiations as a result of receiving a “request for

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26 ² The other primary condition precedent is that the petition be filed no earlier than 135
days, and no later than 160 days, after such negotiations have been initiated, which is
not disputed or admitted in this motion.

27 ³ A.C.C. R14-2-1505 specifically states that any subsequent or replacement
28 interconnection agreements are subject to the provisions fo Article XIV, including the
restriction in A.C.C. R14-2-1505(A)(1).

1 interconnection, services, or network elements.” The parties have been interconnected
2 and providing each other services and network elements under their Existing ICA since
3 1997.
4

5 In its Petition, Qwest admits the existence of the interconnection agreement.
6 Qwest Petition, 3:20-24. While mischaracterizing the Existing ICA as “expiring,”
7 Qwest does admit that that the Existing ICA is currently in effect, and “remains in effect
8 until a new agreement becomes effective between the parties.” Id. Accordingly, Qwest
9 does not, and cannot, anywhere in their petition claim that it has made a “request for
10 interconnection, services, or network elements pursuant to section 251 of this title.” 47
11 U.S.C. 251(a)(1). Therefore, while Qwest alleges it made a negotiation request, that
12 request was not and could not have been made “under this section” within the meaning
13 of Section 252(b)(1) because the negotiation request was not made upon a request for
14 interconnection or new services.
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16 North County respectfully submits that Qwest’s Petition for Arbitration must fail
17 where it merely alleges a request for negotiations was made, and does not allege any
18 request for interconnection or new services was made. North County also submits that
19 this defect cannot be cured by amendment, because it is clear from the admitted fact that
20 the parties have been interconnected pursuant to an existing ICA since 1997 that no
21 request for interconnection or services covered by the existing ICA can be made.
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1 **B. North County Respectfully Submits That The Commission Lacks**
2 **Jurisdiction To Arbitrate A Re-Negotiation.**
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4 As noted above, the 1996 Act pre-empts state authority to regulate some aspects
5 of local intrastate communications, and also empowers state utility commissions to act
6 in certain ways within the limits of the 1996 Act. *See, Qwest Corp. v. Ariz. Corp.*
7 *Comm’n*, 496 F.Supp.2d 1069, 1077 (D. Ariz. 2007) *aff’d* 567 F.3d 1109, 1111-1112
8 (9th Cir. 2009). Thus, while the 1996 Act “permits a great deal of state commission
9 involvement,” state utility commission actions must be limited by the express scope of
10 the 1996 Act. *Verizon North, Inc. v. Strand*, 309 F.3d 935, 944 (6th Cir. 2002); *Qwest*
11 *Corp. v. Ariz. Corp. Comm’n*, 567 F.3d at 1119.
12

13 The 1996 Act expressly empowers state utility commissions to arbitrate
14 interconnection agreements in Section 252(b). As we have seen, it also places a number
15 of limits on that authority to arbitrate, not the least of which is that the state utilities
16 commissions may only arbitrate disputes as a consequence of negotiations invoked
17 “under this title.” And, as established above, negotiations “under this title” may only
18 occur “[u]pon receiving a request for interconnection, services, or network elements.”
19 47 U.S.C. § 252(a), (b). Finally, as also discussed above, no such request for
20 interconnection or services has been made, or could be made where there is an existing
21 interconnection agreement between the parties defining their rights and responsibilities
22 with respect to the interconnection and services.
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1 North County, therefore, respectfully submits that nothing in the plain and
2 unambiguous language of 47 U.S.C. § 252 purports to give state utility commissions
3 jurisdiction to arbitrate attempted re-negotiations of existing contracts that conclusively
4 define the rights of the parties. Congress made their intent to allow invocation of
5 Section 252 negotiations and arbitration only upon interconnection or a request for new
6 services when they included this plain condition in the statute. Such an explicit
7 condition makes it exceeding transparent that Congress did not want to give carriers the
8 right to re-negotiate new interconnection agreements and compel costly state utilities
9 commission arbitration proceedings whenever a carrier felt like it.
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13 Qwest here is trying to convince this Commission to allow it to do exactly this, to
14 compel arbitration in an attempt to re-negotiate the perfectly valid Existing ICA. Qwest
15 cites no authority in their Petition that would even hint that they have a right to compel
16 arbitration under these circumstances, and that Petition is facially insufficient to try to
17 claim this is some sort of new interconnection agreement. There is no such authority.
18 While this may be the first time a carrier has tried to invoke Commission arbitration
19 jurisdiction under Section 252 in Arizona, other state utilities commissions being
20 presented with this issue have resoundingly found that the clear language of Section 252
21 does not confer such jurisdiction.
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25 The Regulatory Commission of Alaska ("Alaska Commission"), when presented
26 with a similar request to invoke its jurisdiction under Section 252 to renegotiate an
27 existing agreement soundly declared:
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1 While we recognize our obligation to arbitrate unresolved issues, we
2 will not re-arbitrate provisions in an existing agreement if the
3 provisions are compliant with the Act. It is not in the public interest
4 to re-arbitrate or create new agreements to cover resolved issues.

5 *In the Matter of the Request by GCI Communication Corp. d/b/a General*
6 *Communication, Inc., and d/b/a GCI for Mediation Regarding Glacier State Study Area*
7 *Interconnection Disputes with ACS Of The Northland, Inc. d/b/a Alaska*
8 *Communications Systems, ACS Local Service and ACS, Case No. U-02-18, Order No. 2,*
9 *p. 5 (filed Aug 29, 2002) (attached to the accompanying Affidavit of J. Dicks as Exhibit*
10 *“B”).*

12 In that case, the parties and the Commission had previously arbitrated multiple
13 interconnection agreements and one of the parties was again petitioning for arbitration
14 as to some unresolved issues. *Id.* at p. 1-3. The opposing party moved to dismiss the
15 petition as to all issues that were resolved in the previous interconnection agreements.
16 *Id.* The Alaska Commission, admitting that the issue was one of first impression,
17 examined the limits of its jurisdiction as an arbiter under Section 252. *Id.*, at p. 3-5. The
18 Alaska Commission found that its jurisdiction was limited to arbitrating “any open
19 issues” or any “unresolved issues” within the meaning of Section 252(b)(4)(B). *Id.* at p.
20 5. The Alaska Commission also ruled that, “[t]he issues are unresolved if the parties
21 have not agreed to be bound by the provisions of an existing interconnection
22 agreement.” *Id.* The Alaska Commission therefore found that the petition for
23 arbitration could proceed, but only in regards to interconnection services and network
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1 elements that [were] not provided in the existing interconnection agreement.” *Id.* at p.
2 6. In the instant case, Qwest does not claim that any of its wish list of re-negotiation
3 points is a request for new services or that they pertain to services or network elements
4 not provided for in the existing agreement. Based upon the sound reasoning and logic
5 of the Alaska Commission’s holding, Qwest’s Petition fails to invoke Commission
6 jurisdiction. A carrier simply cannot compel arbitration on issues settled by an existing
7 interconnection agreement.
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10 The Ohio Public Utilities Commission (“Ohio Commission”) essentially reached
11 the same conclusion as the Alaska Commission while reasonably narrowing the scope
12 of unresolved issues that could invoke Section 252 jurisdiction in, *In the Matter of the*
13 *Petition of Global NAPs Ohio for Arbitration Pursuant to Sections 251 and 252 of the*
14 *Telecommunications Act of 1996 to Establish an Interconnection Agreement with the*
15 *Ohio Bell Telephone Company dba AT&T Ohio*, Finding and Order, Case No. 09-195-
16 TP-ARB (filed January 7, 2010) (attached to the accompanying Affidavit of J. Dicks as
17 Exhibit “C”). In that case, the parties had an existing interconnection agreement,
18 however it explicitly stated that the parties had not reached a meeting of the minds as to
19 whether VoIP and Internet Telephony traffic constituted local traffic. *Id.* at p. 1. The
20 interconnection agreement also explicitly reserved the right of both parties to advocate
21 their positions on that matter before any commission or court. While this issue was left
22 expressly unresolved and the parties reserved the right to arbitrate it, the Ohio
23 Commission refused to do so, holding that, “arbitrations may only occur in accordance
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1 with all of the terms of the existing agreement.” *Id.* at p. 4. The Ohio Commission
2 further opined that the party requesting this arbitration of only one aspect of an
3 interconnection agreement should pursue its limited desires “through the dispute
4 resolution process in its exiting interconnection agreement or through the negotiation of
5 a successor agreement.” *Id.* In the instant case, Qwest admits that there have been
6 many amendments to the Existing ICA here, showing that there is a robust and well
7 understood dispute resolution process that can easily handle the mere two sections of
8 changes Qwest identifies in its Petition. And the requests made by Qwest do not even
9 come close to being as clearly unresolved as the issues in the case above, where they
10 were explicitly stated to be unresolved. The ruling of the Ohio Commission shows it
11 not only agrees with the Alaska Commission that Section 252 jurisdiction cannot be
12 invoked to re-negotiate resolved issues or alter an existing interconnection agreement,
13 but also that it cannot even be invoked to settle a very small number of clearly
14 unresolved issues. In this case, the two sections Qwest presents as changes from the
15 Existing ICA do not even present any “unresolved issues” since they are clearly covered
16 by the Existing ICA.

22 Both of the above cases raised the same issue, but in an even more compelling
23 way because they both presented issues between the parties that were truly unresolved
24 by their existing interconnection agreements. In the first case, the Alaska Commission
25 only found jurisdiction to deal with issues expressly left unresolved by the existing
26 interconnection agreement, and in the second, the Ohio Commission refused to find

1 jurisdiction to resolve explicitly unresolved issues if they were small in number and
2 better addressed by the dispute resolution mechanism of the existing interconnection
3 agreement. The second case also raises the specter of the Commission being asked to
4 modify an existing interconnection agreement, which is clearly forbidden, except in the
5 most general rulemaking proceedings. While Qwest narrowly avoids this blunder by
6 proposing a new interconnection agreement, they do hint that mere amendment is their
7 goal noting only two sections of material difference between the existing ICA and their
8 improperly proposed agreement. Regardless, it is abundantly clear that the two
9 Commissions hearing the same sort of request to date have agreed with the plain
10 language of Section 251 and found that there is no jurisdiction vested in state utility
11 commissions to arbitrate matters resolved by an existing interconnection agreement like
12 the Existing ICA in this case.

17 From all the foregoing, it is clear that the plain language of Section 252 requires a
18 negotiation request to be made upon interconnection or new service request for the
19 negotiation and any subsequent arbitration to invoke the jurisdiction and rights of that
20 section. This explicit condition precedent is obviously not unambiguous, could not
21 possibly be construed as waiving the very condition precedent it sets up, and there is no
22 language in the Section indicating any right of carriers to compel renegotiation and
23 arbitration at whim to set aside existing agreements. The state utility commissions
24 hearing such requests have identified the clear language of Section 252 as limiting their
25 jurisdiction to deciding only issues not resolved by existing interconnection agreements.

1 And, those decisions tend to hint that the real effect of a request to re-negotiate like
2 Qwest's would likely be tantamount to asking state commissions to upset and modify
3 existing interconnection agreements, which may only be done in special circumstance
4 not even vaguely present here. For all these reasons, North County respectfully submits
5 that Section 252 does not confer jurisdiction on this Commission to arbitrate attempts at
6 re-negotiating existing interconnection agreements such as the Existing ICA here.
7

8 **IV. Conclusion**

10 Qwest has failed to plead the requisite condition precedent to negotiating and
11 arbitrating a new interconnection agreement under the rights and jurisdiction conferred
12 by 47 U.S.C. §§ 251 and 252 because it cannot allege it made any request for
13 interconnection, service, or network element where the parties have been interconnected
14 pursuant to the existing ICA for over a decade. Qwest has failed to plead that the
15 Commission has jurisdiction to arbitrate at whim re-negotiations of existing
16 interconnection agreements. Qwest cannot make such a showing of jurisdiction where
17 the plain language of the statute does not allow it and the Commissions hearing similar
18 requests have never found jurisdiction to settle issues that are resolved by existing
19 interconnection agreements. For all the foregoing reasons, North County respectfully
20 submits that Section 252 does not confer on the Commission jurisdiction to arbitrate
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1 this matter and requests that the Commission dismiss Qwest's Petition since it cannot
2 be amended to state a case for Section 252 jurisdiction.
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5 Dated: April 8, 2010

DICKS & WORKMAN, APC

6
7 By: 

Joseph G. Dicks,
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8
9

10 Copies of the foregoing mailed/delivered
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